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8 [Additional Captions on Signature Page]

9 *Attorney for Plaintiff Michelle Stevens*

10 **UNITED STATES DISTRICT COURT**
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

12 MICHELLE STEVENS, Individually and
13 on Behalf of All Others Similarly Situated,

14 Plaintiff,

15 v.

16 ELLIE MAE, INC., SIGMUND
17 ANDERMAN, JONATHAN H. CORR,
KAREN BLASING, CARL
BUCELLATO, CRAIG DAVIS, A.
BARR DOLAN, ROBERT J. LEVIN,
MARINA LEVINSON, JEB S. SPENCER,
and RAJAT TANEJA,

18 Defendants.

19 Case No. 3:19-cv-01414

20 **CLASS ACTION COMPLAINT FOR**
21 **VIOLATIONS OF SECTIONS 14(a) AND**
22 **20(a) OF THE SECURITIES**
23 **EXCHANGE ACT OF 1934**

24 **JURY TRIAL DEMANDED**

25 **CLASS ACTION COMPLAINT FOR VIOLATIONS OF SECTIONS 14(a) AND 20(a) OF**
26 **THE SECURITIES EXCHANGE ACT OF 1934**

1 Plaintiff Michelle Stevens (“Plaintiff”), by her undersigned attorneys, alleges upon
 2 personal knowledge with respect to herself, and upon information and belief based upon, *inter*
 3 *alia*, the investigation of counsel as to all other allegations herein, as follows:

4 **NATURE OF THE ACTION**

5 1. This action is brought as a class action by Plaintiff on behalf of herself and the other
 6 public holders of the common stock of Ellie Mae, Inc. (“Ellie Mae” or the “Company”) against the
 7 Company and the members of the Company’s board of directors (collectively, the “Board” or
 8 “Individual Defendants,” and, together with Ellie Mae, the “Defendants”) for their violations of
 9 Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C.
 10 §§ 78n(a), 78t(a), SEC Rule 14a-9, 17 C.F.R. 240.14a-9, and Regulation G, 17 C.F.R. § 244.100,
 11 in connection with the proposed acquisition (the “Proposed Transaction”) of Ellie Mae by Thoma
 12 Bravo LLC (“Thoma Bravo”).

13 2. On February 28, 2019, the Board caused the Company to enter into an agreement
 14 and plan of merger (“Merger Agreement”), pursuant to which Ellie Mae stockholders will receive
 15 \$99.00 in cash for each share of Ellie Mae common stock they hold (the “Merger Consideration”).

16 3. On March 15, 2019, in order to convince Ellie Mae shareholders to vote in favor of
 17 the Proposed Transaction, the Board authorized the filing of a materially incomplete and
 18 misleading Proxy Statement on Schedule 14A (the “Proxy”) with the Securities and Exchange
 19 Commission (“SEC”), in violation of Sections 14(a) and 20(a) of the Exchange Act.

20 4. While Defendants are touting the fairness of the Merger Consideration to the
 21 Company’s shareholders in the Proxy, they have failed to disclose certain material information
 22 that is necessary for stockholders to properly assess the fairness of the Proposed Transaction,
 23 thereby rendering certain statements in the Proxy false and/or misleading.

24 5. In particular, the Proxy contains materially incomplete and misleading information
 25 concerning Ellie Mae’s financial projections, which were developed by the Company’s
 26 management and relied on by the Board to recommend the Proposed Transaction.

1 6. It is imperative that the material information that has been omitted from the Proxy
2 is disclosed to the Company's shareholders prior to the forthcoming shareholder vote, so that they
3 can properly exercise their corporate suffrage rights.

4 7. For these reasons, and as set forth in detail herein, Plaintiff asserts claims against
5 Defendants for contraventions of: (i) Rule 14a-9; and (ii) Regulation G, 17 C.F.R. § 244.100, in
6 violation of Sections 14(a) and 20(a) of the Exchange Act. Plaintiff seeks to enjoin Defendants
7 from holding the shareholder vote on the Proposed Transaction and taking any steps to
8 consummate the Proposed Transaction unless, and until, the material information discussed below
9 is disclosed to Ellie Mae stockholders sufficiently in advance of the vote on the Proposed
10 Transaction or, in the event the Proposed Transaction is consummated, to recover damages
11 resulting from the Defendants' violations of the Exchange Act.

JURISDICTION AND VENUE

13 8. This Court has subject matter jurisdiction pursuant to Section 27 of the Exchange
14 Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1331 (federal question jurisdiction) as Plaintiff alleges
15 violations of Section 14(a) and 20(a) of the Exchange Act.

16 9. Personal jurisdiction exists over each Defendant either because the Defendant
17 conducts business in or maintains operations in this District or is an individual who is either present
18 in this District for jurisdictional purposes or has sufficient minimum contacts with this District as
19 to render the exercise of jurisdiction over Defendant by this Court permissible under traditional
20 notions of fair play and substantial justice.

21 10. Venue is proper in this District under Section 27 of the Exchange Act, 15 U.S.C. §
22 78aa, as well as under 28 U.S.C. § 1391, because Ellie Mae is headquartered in this District.

PARTIES

11. Plaintiff is, and at all relevant times has been, an Ellie Mae shareholder.

1 12. Defendant Ellie Mae is a Delaware corporation and maintains its principal
2 executive offices at 4420 Rosewood Drive, Suite 500, Pleasanton, CA 94588. Ellie Mae's
3 common stock is traded on the New York Stock Exchange under the ticker symbol "ELLI."

4 13. Individual Defendant Sigmund Anderman founded the Company and has served as
5 Ellie Mae's Executive Chairman since February 2015.

6 14. Individual Defendant Jonathan H. Corr has served as Chief Executive Officer of
7 the Company since February 2015 and as a director of the Company since 2015.

8 15. Individual Defendant Karen Blasing has served as a director of the Company since
9 June 2015.

10 16. Individual Defendant Carl Buccellato has served as a director of the Company since
11 December 1997.

12 17. Individual Defendant Craig Davis has served as a director of the Company since
13 January 2004.

14 18. Individual Defendant A. Barr Dolan has served as a director of the Company since
15 June 2005.

16 19. Individual Defendant Robert J. Levin has served as a director of the Company since
17 June 2009.

18 20. Individual Defendant Marina Levinson has served as a director of the Company
19 since August 2014.

20 21. Individual Defendant Jeb S. Spencer has served as a director of the Company since
21 August 2011.

22 22. Individual Defendant Rajat Taneja has served as a director of the Company since
23 June 2015.

24 23. The Individual Defendants and Ellie Mae may collectively be referred to as
25 "Defendants." Each of the Individual Defendants herein is sued individually as well as in his or
26 her capacity as an officer and/or trustee of the Company, and the liability of each arises from the
27

1 fact that he or she has engaged in all or part of the unlawful acts, plans, schemes, or transactions
 2 complained of herein.

3 **CLASS ACTION ALLEGATIONS**

4 24. Plaintiff brings this class action pursuant to Fed. R. Civ. P. 23 on behalf of herself
 5 and the other public shareholders of Ellie Mae (the “Class”). Excluded from the Class are
 6 Defendants herein and any person, firm, trust, corporation, or other entity related to or affiliated
 7 with any Defendant.

8 25. This action is properly maintainable as a class action because:

9 a. The Class is so numerous that joinder of all members is impracticable.
 10 According to the Proxy, as of March 14, 2019, there were approximately 35,044,413 shares
 11 of Ellie Mae common stock outstanding, held by hundreds to thousands of individuals and
 12 entities throughout the country. The actual number of public shareholders of Ellie Mae
 13 will be ascertained through discovery;

14 b. There are questions of law and fact that are common to the Class that
 15 predominate over any questions affecting only individual members, including the
 16 following:

17 i) whether Defendants disclosed material information that includes
 18 non-GAAP financial measures without a presentation and
 19 reconciliation of those measures to their most directly comparable
 20 GAAP equivalent in violation of Section 14(a) of the Exchange Act;
 21 ii) whether the omission of the GAAP financial measures violates
 22 Section 14(a) of the Exchange Act;
 23 iii) whether the Individual Defendants have violated Section 20(a) of
 24 the Exchange Act; and
 25 iv) whether Plaintiff and other members of the Class will suffer
 26 irreparable harm if compelled to vote their shares regarding the

Proposed Transaction based on the materially incomplete and misleading statements in the Proxy.

c. Plaintiff is an adequate representative of the Class, has retained competent counsel experienced in litigation of this nature, and will fairly and adequately protect the interests of the Class;

d. Plaintiff's claims are typical of the claims of the other members of the Class and Plaintiff does not have any interests adverse to the Class;

e. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for the party opposing the Class;

f. Defendants have acted on grounds generally applicable to the Class with respect to the matters complained of herein, thereby making appropriate the relief sought herein with respect to the Class as a whole; and

g. A class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

SUBSTANTIVE ALLEGATIONS

26. Ellie Mae is a cloud-based platform provider for the mortgage finance industry.

27. On February 12, 2019, Ellie Mae announced the Proposed Transaction in a press release which states, in pertinent part:

Ellie Mae Stockholders to Receive \$99.00 Per Share in Cash; Ellie Mae to Continue Driving Mortgage Finance Innovations as a Privately Held Company

PLEASANTON, Calif. – Feb. 12, 2019 – Ellie Mae® (NYSE:ELLI), the leading cloud-based platform provider for the mortgage finance industry, announced that it has entered into a definitive agreement to be acquired by Thoma Bravo, LLC, a leading private equity investment firm, in an all-

1 cash transaction that values Ellie Mae at an aggregate equity value of
 2 approximately \$3.7 billion.

3 Under the terms of the agreement, all Ellie Mae shareholders will receive
 4 \$99.00 in cash per share. The price per share represents a 47 percent
 5 premium to the 30-day average closing share price and 49 percent
 6 premium to the 60-day average closing price as of February 1, 2019.

7 “Since the founding of Ellie Mae more than 20 years ago, our mission has
 8 been simple – to automate everything automatable for the residential
 9 mortgage industry,” said Jonathan Corr, president and CEO of Ellie Mae.
 10 “As we enter this next phase of our digital mortgage journey, we are
 11 thrilled to provide immediate value to our shareholders. With the
 12 investment and support from Thoma Bravo, we will remain committed to
 13 our customers’ success, innovation and growth of the Encompass Digital
 14 Lending Platform while maintaining our position as a best place to work.”

15 “Ellie Mae delivers powerful and innovative mortgage technology
 16 solutions across every channel of the residential mortgage sector, enabling
 17 lenders to originate more loans while reducing costs and driving
 18 efficiency, quality and compliance throughout the mortgage process,” said
 19 Holden Spaht, a Managing Partner at Thoma Bravo. “Ellie Mae is leading
 20 the digital transformation of the residential mortgage industry and we look
 21 forward to building on the company’s successes and to our partnership
 22 through this next chapter of growth.”

23 Ellie Mae’s Board of Directors unanimously approved the definitive
 24 agreement and recommended that stockholders vote their shares in favor
 25 of the transaction. Ellie Mae’s headquarters will remain in Pleasanton,
 26 California, with regional offices across the United States. Closing of the
 27 transaction is subject to approval by Ellie Mae stockholders and regulatory
 28 authorities and the satisfaction of customary closing conditions. The
 29 transaction is expected to close in the second or third quarter of 2019 and
 30 is not subject to a financial condition.

31 The agreement includes a 35 day “go-shop” period, which permits Ellie
 32 Mae’s Board and advisors to actively initiate, solicit, encourage, and
 33 potentially enter negotiations with parties that make alternative acquisition
 34 proposals. Ellie Mae will have the right to terminate the merger agreement
 35 to enter into a superior proposal subject to the terms and conditions of the
 36 merger agreement. There can be no assurance that this 35 day “go-shop”
 37 will result in a superior proposal, and Ellie Mae does not intend to disclose
 38 developments with respect to the solicitation process unless and until the
 39 Board makes a determination requiring further disclosure.

1 J.P. Morgan Securities LLC is serving as the exclusive financial advisor to
 2 Ellie Mae and Cooley LLP is serving as the legal advisor to Ellie Mae.
 3 Jefferies LLC served as financial advisor to Thoma Bravo and Kirkland &
 4 Ellis LLP served as legal advisor to Thoma Bravo. Financing for the
 5 transaction is being provided by Jefferies Finance LLC.

6 28. The Merger Consideration appears to be inadequate and undervalues the
 7 Company's shares and the misrepresentations and/or omissions in the Proxy conceal and/or
 8 mislead shareholders about the true fair value of their shares. Defendants claim the Merger
 9 Consideration represents a premium of approximately: (1) 21% to \$81.92, the closing price of Ellie
 10 Mae common stock on February 11, 2019, the last full trading day prior to public announcement
 11 of Ellie Mae's entry into the Merger Agreement; (2) 35% to \$73.50, the 30-day volume weighted
 12 average price of Ellie Mae common stock ending on February 11, 2019. Proxy, Cover Letter.
 13 Defendants also claim a premium of 30% to \$76.43, the unaffected closing price of Ellie Mae
 14 common stock on February 1, 2019, the last full trading day prior to market speculation about a
 15 potential transaction involving Ellie Mae, and approximately 42% to the one-month average
 16 closing price of \$69.64, and approximately 49% to the three-month average closing price of
 17 \$66.62, in each case, ending on February 1, 2019. Proxy, p. 39. These representations are
 18 misleading.

19 29. The Company reported its Fourth Quarter and full year ended December 31, 2018,
 20 financial results on February 14, 2019, including revenues of \$116.0 million up from \$112.9
 21 million from the same quarter the previous year. Full year revenue was \$480.3 million vs. \$417.0
 22 million for 2017.

23 30. Since the announcement of the Proposed Transaction, Ellie Mae's stock has
 24 dropped to below the \$99.00 per share Merger Consideration.

25 **The Materially Incomplete and Misleading Proxy**

26 31. On March 15, 2019, Defendants caused the Proxy to be filed with the SEC in
 27 connection with the Proposed Transaction. The Proxy solicits the Company's shareholders to vote
 28 in favor of the Proposed Transaction. Defendants were obligated to carefully review the Proxy

1 before it was filed with the SEC and disseminated to the Company's shareholders to ensure that it
 2 did not contain any material misrepresentations or omissions. However, the Proxy misrepresents
 3 and/or omits both required and material information that is necessary for the Company's
 4 shareholders to make an informed decision concerning whether to vote in favor of the Proposed
 5 Transaction, in violation of Sections 14(a) and 20(a) of the Exchange Act.

6 ***The Materiality of Financial Projections***

7 32. A company's financial forecasts are material information a board relies on to
 8 determine whether to approve a merger transaction and recommend that shareholders vote to
 9 approve the transaction. Here, the financial forecasts were relied on to approve the Merger
 10 Agreement and recommend the Proposed Transaction to shareholders. Proxy, p. 39.

11 33. When soliciting proxies from shareholders, a company must furnish the
 12 information found in Schedule 14A (codified as 17 C.F.R. § 240.14a-101). Item 14 of Schedule
 13 14A sets forth the information a company must disclose when soliciting proxies regarding mergers
 14 and acquisitions. In regard to financial information, companies are required to disclose "financial
 15 information required by Article 11 of Regulation S-X[,]” which includes Item 10 of Regulation S-
 16 K. *See* Item 14(7)(b)(11) of 17 C.F.R. § 240.14a-101.

17 34. Under Item 10 of Regulation S-K, companies are encouraged to disclose
 18 "management's projections of future economic performance that have a reasonable basis and are
 19 presented in an appropriate format." 17 C.F.R. § 229.10(b). Although the SEC recognizes the
 20 usefulness of disclosing projected financial metrics, the SEC cautions companies to "take care to
 21 assure that the choice of items projected is not susceptible of misleading inferences through
 22 selective projection of only favorable items." *Id.*

23 35. In order to facilitate investor understanding of the Company's financial projections,
 24 the SEC provides companies with certain factors "to be considered in formulating and disclosing
 25 such projections[,"] including:

26 (i) When management chooses to include its projections in a Commission filing,
 27 *the disclosures accompanying the projections should facilitate investor*

1 *understanding of the basis for and limitations of projections.* In this regard investors
 2 should be cautioned against attributing undue certainty to management's
 3 assessment, and the Commission believes that investors would be aided by a
 4 statement indicating management's intention regarding the furnishing of updated
 5 projections. *The Commission also believes that investor understanding would be
 6 enhanced by disclosure of the assumptions which in management's opinion are
 7 most significant to the projections or are the key factors upon which the financial
 8 results of the enterprise depend and encourages disclosure of assumptions in a
 9 manner that will provide a framework for analysis of the projection.*

10 (ii) Management also should consider whether disclosure of the accuracy or
 11 inaccuracy of previous projections would provide investors with important insights
 12 into the limitations of projections. In this regard, *consideration should be given to
 13 presenting the projections in a format that will facilitate subsequent analysis of the
 14 reasons for differences between actual and forecast results.* An important benefit
 15 may arise from the systematic analysis of variances between projected and actual
 16 results on a continuing basis, since such disclosure may highlight for investors the
 17 most significant risk and profit-sensitive areas in a business operation.

18 *Id.* (emphasis added).

19 36. Here, Ellie Mae's shareholders would clearly find complete and non-misleading
 20 financial projections material in deciding how to vote, considering that in negotiating the Merger
 21 Consideration and making its recommendation that shareholders vote in favor of the Proposed
 22 Transaction, the Board instructed management to construct a five-year financial plan that it
 23 deemed "were the most current and predictive forecasts of the future financial performance of Ellie
 24 Mae and approved the five-year financial plan (the 'Five-Year Projections')."
 25 Proxy, pp. 31, 48.

26 37. Despite disclosing that the Five-Year Projections were the most predictive of Ellie
 27 Mae's future performance, the Board issued the Proxy with another set of projections called
 28 "Management Projections" and now in the Proxy claims the following:

29 The Management Projections were based on the Five-Year Projections that Ellie
 30 Mae management presented to the Board of Directors in January 2019 in
 31 connection with the Board of Directors' review of the proposed Merger, and
 32 updated to include certain financial forecasts for calendar years 2024-2028 and
 33 Unlevered Free Cash Flow for calendar years 2019-2028. A subset of the Five-Year
 34 Projections was made available to Parent and Merger Sub at Parent's request in
 35 connection with their due diligence review, and the Management Projections were
 36 made available to J.P. Morgan in connection with the rendering of J.P. Morgan's
 37 opinion to the Board of Directors.

1 *Id.*, p. 48.¹

2 38. As discussed further below, the non-GAAP financial projections here do not
 3 provide Ellie Mae's shareholders with a materially complete understanding of the assumptions and
 4 key factors considered in developing the Forecasts, which assumptions, factors and other inputs
 5 the Board reviewed.

6 ***The Financial Projections are Materially Incomplete***

7 39. The Proxy discloses non-GAAP financial Projections "... in order to provide Ellie
 8 Mae stockholders with access to information that was made available to, and approved by, the
 9 Board of Directors in connection with its evaluation of the Merger and the Per Share Merger
 10 Consideration." *Id.*

11 40. Nevertheless, the Proxy fails to disclose certain material information regarding the
 12 Projections, rendering the Proxy materially false and/or misleading.

13 41. More specifically, the Proxy discloses that the Projections were not prepared in
 14 compliance with GAAP and no reconciliation of the non-GAAP financial Projections with GAAP
 15 financial projections is provided under Regulation G (Proxy, p. 49) and self-servingly claims
 16 exemption from Regulation G solely because its financial advisor J.P. Morgan also relied on
 17 certain of the Projections in its methodology for the fairness opinion. This self-serving legal
 18 conclusion is wrong and conflicts directly with the language of Regulation G and the official SEC
 19 position on the application of Regulation G, as discussed below.

20 42. The use of non-GAAP financial Projections without complying with Regulation G
 21 and otherwise disclosing the GAAP compliant financial metrics is misleading and the omission of
 22 GAAP compliant financial projections violates Section 14(a).

23 43. The Proxy discloses projected "Adjusted EBITDA" and Unlevered Free Cash Flow
 24 ("UFCF"). Adjusted EBITDA is defined as "non-GAAP financial measure and is earnings before
 25

26 ¹ Both sets of projections may collectively also be referred to as "Projections" unless
 27 otherwise distinguished.

1 interest, tax, depreciation and amortization and excludes stock-based compensation expense.”
 2 UFCF is defined as “a non-GAAP financial measure and is calculated as Adjusted EBITDA (as
 3 shown in the table above) less (i) stock-based compensation, less (ii) estimated cash tax expense,
 4 less (iii) property and equipment capital expenditures, less (iv) internal-use software capital
 5 expenditures, plus or minus (v) change in net working capital.” Proxy, p 48, n.1-2. The Proxy fails
 6 to disclose the specific line items used to calculate these two non-GAAP financial projections or
 7 provide a reconciliation of these non-GAAP measures to their respective most comparable GAAP
 8 measures. Proxy, p. 48.

9 44. Thus, the Proxy’s disclosure of these non-GAAP financial forecast provides an
 10 incomplete and materially misleading understanding of the Company’s future financial prospects
 11 and the inputs and assumptions for which those prospects are based upon as it is clear that those
 12 line items were in fact forecasted and utilized in calculating the non-GAAP measures disclosed
 13 and relied on by the Board to recommend the Proposed Transaction, in violation of Section 14(a)
 14 of the Exchange Act.

15 45. The Projections disclosed on page 48 of the Proxy violate Section 14(a) of the
 16 Exchange Act because: (1) the use of such forecasted non-GAAP financial measures alone violates
 17 SEC Regulation G as Defendants failed to reconcile those non-GAAP measures to their closest
 18 GAAP equivalents or otherwise disclose the specific financial assumptions and inputs used to
 19 calculate the non-GAAP measures; and (2) violates SEC Regulation 14a-9 because they are
 20 materially misleading as shareholders are unable to discern the veracity of the financial
 21 projections. As such, this information must be disclosed in order to cure the materially misleading
 22 disclosures regarding both the financial projections developed by the Company as well as the
 23 projections relied upon by the Company’s financial advisors.

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1 ***The Financial Projections Violate Regulation G***

2 46. The SEC has acknowledged that potential “misleading inferences” are exacerbated
 3 when the disclosed information contains non-GAAP financial measures² and adopted Regulation
 4 G³ “to ensure that investors and others are not misled by the use of non-GAAP financial
 5 measures.”⁴

6 47. Defendants must comply with Regulation G. More specifically, the company must
 7 disclose the most directly comparable GAAP financial measure and a reconciliation (by schedule
 8 or other clearly understandable method) of the differences between the non-GAAP financial
 9 measure disclosed or released with the most comparable financial measure or measures calculated
 10 and presented in accordance with GAAP. 17 C.F.R. § 244.100. This is because the SEC believes
 11 “this reconciliation will help investors . . . to better evaluate the non-GAAP financial measures . .
 12 . [and] more accurately evaluate companies’ securities and, in turn, result in a more accurate
 13 pricing of securities.”⁵

14 48. Moreover, the SEC has publicly stated that the use of non-GAAP financial
 15 measures can be misleading.⁶ Former SEC Chairwoman Mary Jo White has stated that the frequent
 16 use by publicly traded companies of unique, company-specific non-GAAP financial measures

17 2 Non-GAAP financial measures are numerical measures of future financial performance
 18 that exclude amounts or are adjusted to effectively exclude amounts that are included in the most
 19 directly comparable GAAP measure. 17 C.F.R. § 244.101(a)(1).

20 3 Item 10 of Regulations S-K and S-B were amended to reflect the requirements of
 Regulation G.

21 4 United States Securities and Exchange Commission, *Final Rule: Conditions for Use of*
 Non-GAAP Financial Measures (2002), available at <https://www.sec.gov/rules/final/33-8176.htm>
 (last visited Mar. 18, 2019) (“SEC, *Final Rule*”).

22 5 *Id.*

23 6 See, e.g., Nicolas Grabar and Sandra Flow, *Non-GAAP Financial Measures: The SEC’s*
 Evolving Views, Harvard Law School Forum on Corporate Governance and Financial Regulation
 (June 24, 2016), available at <https://corpgov.law.harvard.edu/2016/06/24/non-gaap-financial-measures-the-secs-evolving-views/> (last visited Mar. 18, 2019); Gretchen Morgenson, *Fantasy Math Is Helping Companies Spin Losses Into Profits*, N.Y. Times (Apr. 22, 2016), available at http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-losses-into-profits.html?_r=0 (last visited Mar. 18, 2019).

1 implicates the centerpiece of the SEC's disclosures regime:

2 In too many cases, the non-GAAP information, which is meant to supplement the
 3 GAAP information, has become the key message to investors, crowding out and
 4 effectively supplanting the GAAP presentation. Jim Schnurr, our Chief Accountant,
 5 Mark Kronforst, our Chief Accountant in the Division of Corporation Finance and
 6 I, along with other members of the staff, have spoken out frequently about our
 7 concerns to raise the awareness of boards, management and investors. And last
 8 month, the staff issued guidance addressing a number of troublesome practices
 9 which can make non-GAAP disclosures misleading: the lack of equal or greater
 10 prominence for GAAP measures; exclusion of normal, recurring cash operating
 11 expenses; individually tailored non-GAAP revenues; lack of consistency; cherry-
 12 picking; and the use of cash per share data. I strongly urge companies to carefully
 13 consider this guidance and revisit their approach to non-GAAP disclosures. I also
 14 urge again, as I did last December, that appropriate controls be considered and that
 15 audit committees carefully oversee their company's use of non-GAAP measures
 16 and disclosures.⁷

17 49. The SEC has required compliance with Regulation G, including the reconciliation
 18 requirement in other merger transactions. *Compare Youku Tudou Inc., et al.*, Correspondence 5
 19 (Jan. 11, 2016) (Issuer arguing that Rule 100(d) of Regulation G does not apply to non-GAAP
 20 financials relating to a business combination)⁸, with *Youku Tudou Inc., et al.*, SEC Staff Comment
 21 Letter 1 (Jan. 20, 2016) ("[The SEC] note[s] that your disclosure of projected financial information
 22 is not in response to the requirements of, or pursuant to, Item 1015 of Regulation M-A and is thus
 23 not excepted from Rule 100 of Regulation G.")⁹; *see Harbin Electric, Inc.*, Correspondence 29
 24 (Aug. 12, 2011) ("Pursuant to the requirements of Regulation G, we have added a reconciliation
 25 of actual and projected EBIT to GAAP net income").¹⁰

26 ⁷ Mary Jo White, *Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability* (June 27, 2016), available at <https://www.sec.gov/news/speech/chair-white-icgn-speech.html> (emphasis added) (footnotes omitted) (last visited Mar. 18, 2019).

27 ⁸ Available at <https://www.sec.gov/Archives/edgar/data/1442596/000110465916089133/filename1.htm> (last visited Mar. 18, 2019).

28 ⁹ Available at <https://www.sec.gov/Archives/edgar/data/1442596/000000000016062042/filename1.pdf> (last visited Mar. 18, 2019).

¹⁰ Available at <https://www.sec.gov/Archives/edgar/data/1266719/000114420411046281/filename1.htm> (last visited Mar. 18, 2019). See also *Actel Corporation*, SEC Staff Comment Letter 2 (Oct. 13, 2010), available at <https://www.sec.gov/Archives/edgar/data/907687/filename1.htm>.

1 50. Compliance with Regulation G is mandatory under Section 14(a), and non-
 2 compliance constitutes a violation of Section 14(a). Thus, in order to bring the Proxy into
 3 compliance with Regulation G, Defendants must provide a reconciliation of the non-GAAP
 4 financial measures to their respective most comparable GAAP financial measures.

5 ***The Financial Projections are Materially Misleading and Violate SEC Rule 14a-9***

6 51. In addition to the Proxy's violation of Regulation G, the lack of reconciliation or,
 7 at the very least, the line items utilized in calculating the non-GAAP measures renders the financial
 8 forecasts disclosed materially misleading as shareholders are unable to understand the differences
 9 between the non-GAAP measures and their respective most comparable GAAP financial
 10 measures. Such projections are necessary to make the non-GAAP projections included in the
 11 Proxy not misleading for the reasons discussed above.

12 52. Defendants even admit that the non-GAAP Projections are misleading without the
 13 GAAP compliant projected financial metrics and therefore should be reviewed with GAAP
 14 compliant financial projections:

15 These non-GAAP financial measures should not be viewed as a substitute for
 16 GAAP financial measures and may be different from non-GAAP financial
 17 measures used by other companies. Furthermore, there are limitations inherent
 18 in non-GAAP financial measures because they exclude charges and credits that are
 19 required to be included in a GAAP presentation. **Accordingly, these non-**
GAAP financial measures should be considered together with, and not as an
alternative to, financial measures prepared in accordance with GAAP.

20 /000000000010060087/filename1.pdf (last visited Mar. 18, 2019) ("Opinion of Actel's Financial
 21 Advisor, page 24 . . . This section includes non-GAAP financial measures. Please revise to provide
 22 the disclosure required by Rule 100 of Regulation G."). The SEC Office of Mergers and
 23 Acquisitions applied Regulation G in these transactions, which reflects the SEC's official position.
 24 Any claim that the SEC has officially sanctioned the use of non-GAAP financial forecasts for
 25 business combinations, when the Board itself created and relied on such non-GAAP forecasts to
 26 recommend a transaction such as the Proposed Transaction, is incorrect. The SEC's website
 27 provides certain unofficial guidance for certain matters, called Compliance and Disclosure
 Interpretations ("C&DI") which through the use of Q&As reflect the views of particular SEC staff
 and on which certain issuers have in the past claimed an exemption from Regulation G. The SEC
 itself expressly disclaims C&DIs as they are not regulations that have been reviewed by the SEC,
 and the SEC expressly states that they are not binding and should not be relied on. *See*
 www.sec.gov/divisions/corpfin/cfguidance.shtml (last visited Mar. 18, 2019).

1 Proxy, p. 49.

2 53. And yet, after making the above admission and advising its shareholder to review
 3 the non-GAAP Projections with GAAP projections, Defendants refused to disclose the GAAP
 4 projections.

5 54. Moreover, the Projections are clearly material since the Board considered the
 6 Company's projected financial condition in recommending shareholders vote in favor of the
 7 Proposed Transaction (as discussed above). As such, shareholders would clearly want a complete
 8 and non-misleading understanding of those Forecasts.

9 55. In order to cure the materially misleading nature of the projections under SEC Rule
 10 14a-9 as a result of the omitted information, Defendants must provide a reconciliation table of the
 11 non-GAAP financial measures to the most comparable GAAP measures.

12 56. In sum, the Proxy independently violates: (i) Regulation G, which requires a
 13 presentation and reconciliation of any non-GAAP financial measure to its most directly
 14 comparable GAAP equivalent; and (ii) Rule 14a-9, since the material omitted information renders
 15 certain statements, discussed above, materially incomplete and misleading. As the Proxy
 16 independently contravenes the SEC rules and regulations, Defendants violated Section 14(a) and
 17 Section 20(a) of the Exchange Act by filing the Proxy to garner votes in support of the Proposed
 18 Transaction.

19 57. Absent disclosure of the foregoing material omitted information prior to the special
 20 shareholder meeting, Plaintiff and the other members of the Class will be unable to make a fully-
 21 informed decision regarding whether to vote in favor of the Proposed Transaction, and are thus
 22 threatened with irreparable harm, warranting the injunctive relief sought herein.

23 58. In the event the shareholder vote is not enjoined so that the materially misleading
 24 Proxy can be corrected, then Plaintiff and the other members of the Class seek damages.

COUNT I

**(Against All Defendants for Violations of Section 14(a) of the Exchange Act
and 17 C.F.R. § 244.100 Promulgated Thereunder)**

59. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

6 60. Section 14(a)(1) of the Exchange Act makes it “unlawful for any person, by the use
7 of the mails or by any means or instrumentality of interstate commerce or of any facility of a
8 national securities exchange or otherwise, in contravention of such rules and regulations as the
9 Commission may prescribe as necessary or appropriate in the public interest or for the protection
10 of investors, to solicit or to permit the use of his name to solicit any proxy or consent or
11 authorization in respect of any security (other than an exempted security) registered pursuant to
12 section 781 of this title.” 15 U.S.C. § 78n(a)(1).

13 61. As set forth above, the Proxy omits material information required by SEC
14 Regulation G, 17 C.F.R. § 244.100, which therefore constitutes an independent violation of Section
15 14(a). SEC Regulation G, among other things, requires an issuer that chooses to disclose a non-
16 GAAP measure to provide a presentation of the “most directly comparable” GAAP measure, and
17 a reconciliation “by schedule or other clearly understandable method” of the non-GAAP measure
18 to the “most directly comparable” GAAP measure. 17 C.F.R. § 244.100(a).

19 62. The failure to reconcile the numerous material non-GAAP financial measures
20 included in the Proxy is a violation of Regulation G and constitutes a violation of Section 14(a).

21 63. The misrepresentations and omissions in the Proxy are material to Plaintiff and the
22 Class, who will be deprived of their right to cast an informed vote if such misrepresentations and
23 omissions are not corrected prior to the vote on the Proposed Transaction.

24 64. Plaintiff and the Class have no adequate remedy at law. Only through the exercise
25 of this Court's equitable powers can Plaintiff and the Class be fully protected from the immediate
26 and irreparable injury that Defendants' actions threaten to inflict.

COUNT II

**(Against All Defendants for Violations of Section 14(a) of the Exchange Act
and Rule 14a-9 Promulgated Thereunder)**

65. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

66. SEC Rule 14a-9 prohibits the solicitation of shareholder votes in Proxy communications that contain “any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading[.]” 17 C.F.R. § 240.14a-9.

67. Regulation G similarly prohibits the solicitation of shareholder votes by “mak[ing] public a non-GAAP financial measure that, taken together with the information accompanying that measure . . . contains an untrue statement of a material fact or *omits to state a material fact necessary in order to make the presentation of the non-GAAP financial measure . . . not misleading.*” 17 C.F.R. § 244.100(b) (emphasis added). The SEC’s official public position is to enforce Regulation G in merger transactions by compelling target companies to amend solicitation material, including proxies, to comply with Regulation G.

68. Defendants have issued the Proxy with the intention of soliciting shareholder support for the Proposed Transaction. Each of the Defendants reviewed and authorized the dissemination of the Proxy, which fails to provide critical information regarding, amongst other things, the financial projections for the Company.

69. In so doing, Defendants made untrue statements of fact and/or omitted material facts necessary to make the statements made not misleading. Each of the Individual Defendants, by virtue of their roles as directors, were aware of the omitted information but failed to disclose such information, in violation of Section 14(a). The Individual Defendants were therefore negligent, as they had reasonable grounds to believe material facts existed that were misstated or

1 omitted from the Proxy, but nonetheless failed to obtain and disclose such information to
2 shareholders although they could have done so without extraordinary effort.

3 70. The Individual Defendants knew or were negligent in not knowing that the Proxy
4 is materially misleading and omits material facts that are necessary to render it not misleading.
5 The Individual Defendants undoubtedly reviewed and relied upon the omitted information
6 identified above in connection with their decision to approve and recommend the Proposed
7 Transaction.

8 71. The Individual Defendants knew or were negligent in not knowing that the material
9 information identified above has been omitted from the Proxy, rendering the sections of the Proxy
10 identified above to be materially incomplete and misleading.

11 72. The Individual Defendants were, at the very least, negligent in preparing and
12 reviewing the Proxy. The preparation of a Proxy statement by corporate insiders containing
13 materially false or misleading statements or omitting a material fact constitutes negligence. The
14 Individual Defendants were negligent in choosing to omit material information from the Proxy or
15 failing to notice the material omissions in the Proxy upon reviewing it, which they were required
16 to do carefully as the Company's directors. Indeed, the Individual Defendants were intricately
17 involved in the process leading up to the signing of the Merger Agreement and the preparation of
18 the Company's financial projections.

19 73. Ellie Mae is also deemed negligent as a result of the Individual Defendants'
20 negligence in preparing and reviewing the Proxy.

21 74. The misrepresentations and omissions in the Proxy are material to Plaintiff and the
22 Class, who will be deprived of their right to cast an informed vote if such misrepresentations and
23 omissions are not corrected prior to the vote on the Proposed Transaction.

24 75. Plaintiff and the Class have no adequate remedy at law. Only through the exercise
25 of this Court's equitable powers can Plaintiff and the Class be fully protected from the immediate
26 and irreparable injury that Defendants' actions threaten to inflict.

COUNT III

**(Against the Individual Defendants for Violations
of Section 20(a) of the Exchange Act)**

76. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

6 77. The Individual Defendants acted as controlling persons of Ellie Mae within the
7 meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as
8 officers and/or directors of Ellie Mae, and participation in and/or awareness of the Company's
9 operations and/or intimate knowledge of the incomplete and misleading statements contained in
10 the Proxy filed with the SEC, they had the power to influence and control and did influence and
11 control, directly or indirectly, the decision making of the Company, including the content and
12 dissemination of the various statements that Plaintiff contends are materially incomplete and
13 misleading.

14 78. Each of the Individual Defendants was provided with or had unlimited access to
15 copies of the Proxy and other statements alleged by Plaintiff to be misleading prior to and/or
16 shortly after these statements were issued and had the ability to prevent the issuance of the
17 statements or cause the statements to be corrected.

18 79. In particular, each of the Individual Defendants had direct and supervisory
19 involvement in the day-to-day operations of the Company, and, therefore, is presumed to have had
20 the power to control or influence the particular transactions giving rise to the Exchange Act
21 violations alleged herein and exercised the same. The Proxy at issue contains the unanimous
22 recommendation of each of the Individual Defendants to approve the Proposed Transaction. They
23 were thus directly involved in preparing the Proxy.

24 80. In addition, as described herein and set forth at length in the Proxy, the Individual
25 Defendants were involved in negotiating, reviewing, and approving the Merger Agreement. The
26 Proxy purports to describe the various issues and information that the Individual Defendants

1 reviewed and considered. The Individual Defendants participated in drafting and/or gave their
 2 input on the content of those descriptions.

3 81. By virtue of the foregoing, the Individual Defendants have violated Section 20(a)
 4 of the Exchange Act.

5 82. As set forth above, the Individual Defendants had the ability to exercise control
 6 over and did control a person or persons who have each violated Section 14(a) and Rule 14a-9 by
 7 their acts and omissions as alleged herein. By virtue of their positions as controlling persons, these
 8 Defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate
 9 result of Individual Defendants' conduct, Plaintiff and the Class will be irreparably harmed.

10 83. Plaintiff and the Class have no adequate remedy at law. Only through the exercise
 11 of this Court's equitable powers can Plaintiff and the Class be fully protected from the immediate
 12 and irreparable injury that Defendants' actions threaten to inflict.

13 **PRAYER FOR RELIEF**

14 **WHEREFORE**, Plaintiff prays for judgment and relief as follows:

15 A. Declaring that this action is properly maintainable as a Class Action and certifying
 16 Plaintiff as Class Representative and her counsel as Class Counsel;

17 B. Enjoining Defendants and all persons acting in concert with them from proceeding
 18 with the shareholder vote on the Proposed Transaction or consummating the Proposed Transaction,
 19 unless and until the Company discloses the material information discussed above which has been
 20 omitted from the Proxy;

21 C. Directing Defendants to account to Plaintiff and the Class for all damages sustained
 22 as a result of their wrongdoing;

23 D. Awarding Plaintiff the costs and disbursements of this action, including reasonable
 24 attorneys' and expert fees and expenses; and

25 E. Granting such other and further relief as this Court may deem just and proper.

1 **JURY DEMAND**

2 Plaintiff demands a trial by jury on all issues so triable.

3 Dated: March 18, 2019

4 Respectfully submitted,

5 **FARUQI & FARUQI, LLP**

6 **OF COUNSEL:**

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13 *Counsel for Plaintiff*